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No. 82-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

EMI LIMITED,
Petitioner,

VS.

WILLIAM BENNETT, KENNETH CORY, MARY ANN GRAVES, and GERALD H. GOLDBERG.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT PRIOR TO ENTRY OF DECISION IN THAT COURT AND WHILE CASE IS PENDING THEREIN

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QUESTIONS PRESENTED

1.a. Whether a United Kingdom corporation which has no place of business in the United States, which has no access to the State courts, and which owns an American subsidiary, has standing to sue in the Federal courts for the following relief:

(1) To restrain defendant state tax officials from making further demands on plaintiff, either directly or through pressure on its American subsidiary, for financial information about its operations in other countries which it cannot provide either because the law of the home country prohibits it or because local records of foreign subsidiaries do not segregate it and make it available to plaintiff; and

(2) To restrain defendant state tax officials from assessing a tax on plaintiff's American subsidiary based on the disregard of plaintiff's separate entity, and on the apportionment of plaintiff's income entirely earned abroad to California to tax to that subsidiary, where the economic effect of defendant's conduct is to diminish the value of plaintiff's property in the United States, all contrary to a treaty, to international law, and to the United States Constitution.

b. Whether the relief sought can be granted by a Federal court, where plaintiff has no access to State courts, and the rights plaintiff is suing to enforce are created entirely by Federal sources of law; viz., a treaty, the United States Constitution makes obligatory on the states.

c. Whether the Federal courts can refuse to entertain a case or controversy under International Law and under the Due Process Clause of the Fifth Amendment where the State courts provide no remedy and the rights sought to be enforced are created by the United States Constitution, a treaty to which the United States is a party, and International Law.

d. Whether the Federal courts have subject matter jurisdiction over a case involving asserted violations of a United States treaty, the United States Constitution, and International Law.

It is not contended that this issue is the one which justifies intervention of this Court prior to decision in the Court of Appeals under the standards explained in Rule 18 of the Rules of this Court.

2. Does international custom recognized as such by the Executive and observed by the Federal Government in its own tax system bind the States of the Union or only the Federal Government?

3. May the State of California burden foreign commerce by extending its combined unitary income formula (hereinafter "combined formula") to a United Kingdom corporation which has foreign commerce with the United States but which does no business in any state of the United States, which does not have a permanent establishment in the United States, which is not subject to taxation by the United States Government under either the Internal Revenue Code or the United States-United Kingdom Income Tax Convention, and where the

effect of the State's application of its formula is to apportion income of the non-resident United Kingdom corporation and its non-United States subsidiaries to the American subsidiary for taxation by California where:

a. The entire income of the United Kingdom corporation and of its non-U.S. subsidiaries has already been taxed in full by the United Kingdom and the other host countries, and California allows neither a deduction for those taxes nor a credit for them against its own tax, thus producing multiple taxation of income earned in foreign commerce; and

b. The income of the American subsidiary is swollen by that apportionment far beyond any conceivable earning capacity of its own business; and

c. The apportionment of the combined net income by the three-factor formula of the ratio of California property, payroll and sales to the combined world-wide property, payroll and sales of the United Kingdom parent and its non-U.S. subsidiaries, is made on the basis of estimates, first because the Official Secrets Act of the United Kingdom prohibits the United Kingdom corporations from revealing some of the information essential to the application of the California formula, and second because the wages paid by the non-U.K. subsidiaries are not reported to the United Kingdom parent and are for years before California made its demand and cannot now be assembled; and

d. There is no uniformity between the economic environment in which the American subsidiary operates

and those in which the non-U.S. corporations operate, most notably because the wage rates in the United States for the years before the Court were higher than those prevailing in any other country in which the corporations which California would consolidate operate, with the result that each factor in the formula is weighted to apportion more net income to California than could be earned in that state by the business conducted in it, such income being therefore derived from that properly taxable by the United Kingdom and the other foreign countries where the businesses are conducted; and

e. Where the businesses of the United Kingdom parent, its non-U.S. subsidiaries, and the American subsidiary which are being combined consist primarily of making records and tapes in each country of music popular in that country, and the sale of those records and tapes to the residents of that country, but sales of records in foreign commerce are made by both the U.K. parent and the American subsidiary to customers of their choice, and under a reciprocal matrix exchange agreement both the U.K. parent and the American subsidiary make records of music initially recorded by the other; and

f. Where the effect of the California formula is to tax to the American subsidiary income earned and received exclusively abroad by other corporations from business conducted locally in other countries or in foreign commerce which income California would not have jurisdiction over directly because of the Due Process Clause, of International Law, and

of the United States-United Kingdom Income Tax Convention.

4. Does the United States-United Kingdom Income Tax Convention in effect in the years 1968-1974 prohibit a state's apportioning by formula to an American subsidiary some of the income of its United Kingdom parent corporation where under the treaty the United States cannot tax any of the income of the United Kingdom parent because it does not have a permanent establishment in the United States?

PARTIES TO THE PROCEEDING BELOW

There is no other party to this proceeding. Capitol Industries-EMI, Inc., plaintiff's subsidiary, is a party to a companion but unconsolidated case which was joined in the Court of Appeals for argument and decision, and which is pending before this Court on petition for certiorari in Docket No. 82-688. It will be affected by the outcome of this case.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT PRIOR TO ENTRY OF DECISION IN THAT COURT AND WHILE CASE IS PENDING THEREIN

EMI Limited, a corporation of the United Kingdom, plaintiff in the United States District Court and appellant in the United States Court of Appeals for the Ninth Circuit, petitions for a Writ of Certiorari under Rule 18 of this Court to review the case now pending in and not yet decided by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

There is no opinion of the Court of Appeals. The opinion of the District Court is not officially reported, but is appended hereto in Appendix A. The opinion of the Court of Appeals at a prior stage of these proceedings is reported at 681 F.2d 1107. The portion of it relevant to this petitioner is reproduced in Appendix B hereto.

JURISDICTION

The jurisdiction of this Court is invoked under Sections 1254(1) and 2101(e) of Title 28, United States Code. No decision has yet been rendered by the United States Court of Appeals, in this appeal, which was docketed November 2, 1982. The decision of the District Court, Northern District of California, dismissing the case, was entered on October 8, 1982, and Notice of Appeal was filed by petitioner on October 21, 1982.

The jurisdiction of the federal court was invoked under Sections 1331 and 2201, Title 28, United States Code. Plaintiff has no judicial remedies available to it in the California courts under California statutes and constitution, and for that reason the Court of Appeals held that the provisions of Section 1341, Title 28, United States Code, do not remove this case from the jurisdiction of the federal courts. The dismissal on remand was based on the assertions that petitioner lacks standing to sue, and the federal courts lack jurisdiction of the subject matter. Appendix A.

STATUTES, CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

1. The sections of the Judicial Code involved are Sections 1331 and 2201, Title 28, United States Code. They are set forth verbatim in Appendix C.

2. The sections of the United States Constitution involved are the Commerce Clause (Art. I, Sec. 8, cl. 3), the Due Process Clause (amendment 14, Sec. 1), the Import-Export Clause (Art. I, Sec. 10, cl. 2), and Art. I, Sec. 8, cl. 1 and 10, and Art. I, Sec. 10, cl. 1 and 3; and Art. II, Sec. 2, cl. 1 and 2, Art. III, Sec. 2, cl. 1 and 2, and Art. VI, cl. 2 and 17. All are set forth in Appendix C.

3. The United States-United Kingdom Income Tax Convention in effect in the years involved in this case. The text of the relevant provisions is set forth in full in Appendix D.

STATEMENT OF THE CASE

This case is one to restrain defendant California State tax officials from assessing a tax against petitioner's subsidiary, Capitol Industries-EMI, Inc., on a portion of petitioner's income from its business done exclusively in foreign and local commerce from and in the United Kingdom, in violation of International Law, a federal treaty, and the United States Constitution.

Petitioner, EMI Limited, is a corporation formed in the United Kingdom, which owns all or substantially all of the stock of 76 subsidiary corporations, some of which are formed under the laws of the United Kingdom, and others of which are formed under the laws of the various countries in which they operate. They operate in and are formed under the laws of more than 30 countries in Western Europe, North America, the Near East and the Far East of Asia, South America, South Africa, and Australasia. Capitol Industries-EMI, Inc. is one such subsidiary, and has been since plaintiff acquired a majority of its stock in 1956. Capitol Industries-EMI, Inc. (hereinafter "Capitol") is formed under the laws of the United States, has its principal office and plant in Hollywood, California, and has other plants in Illinois, Virginia and Connecticut.

EMI Limited does not do business in the United States and does not have a permanent establishment in this country. By treaty it is exempt from United States tax. In its corporate self it does no business outside of the United Kingdom. EMI's worldwide subsidiaries make approxi-

mately 20% of all of the phonograph records made in the Western world, and own pressing plants located in 13 countries. Three of these plants are in the United States, owned by Capitol. In addition to that type of music business, through subsidiaries operating in several countries, but not in the United States, the EMI group is in the business of retailing phonograph records and pre-recorded tapes, and sheet music.

Subsidiaries of EMI also operate a variety of other businesses: the manufacture of television cameras, antennae and transmission equipment, and of security devices; the operation of a movie studio at which both television films and films for the theater are made; the operation of movie theaters, bingo parlors, hotels, restaurants, and places of amusement; the manufacture for the government of the United Kingdom and certain governments of NATO of military equipment, much of which employs radar principles pioneered and in some instances invented by EMI; and the development and production of equipment in the field of medical electronics, the most notable of which is the invention and patenting of the brain scanner and body scanner. Capitol conducts no business other than the making of phonograph records and pre-recorded tapes, and at times the manufacture and sale of raw tapes for use by other recording companies.

Defendants demanded information of EMI Limited, threatening it with monetary penalties if it did not reply. EMI informed them that it was not within the jurisdiction of California, could not supply some of the information sought because of restrictions of the Official Secrets Act of the United Kingdom, and did not possess other of the information sought because it was not supplied to EMI by

EMI's non-U.K. subsidiaries. Defendants then made the same request for information of Capitol, with the same threat of a penalty, and Capitol informed defendants that it could not supply information about EMI which it could not get from EMI. Defendant's staff then compiled figures about EMI available from public sources in the United States, and assessed a proposed additional tax against Capitol based upon what they believed to be the total net income of EMI and all of its worldwide subsidiaries, and an apportionment of it to California based upon the ratio which the California property, payroll and sales of Capitol bore to what defendants estimated was the total worldwide property, payroll and sales of EMI and its subsidiaries. The non-U.K., non-U.S. property and payroll figures were unknown and defendants substituted their estimates. Capitol protested this action, conferences were held by Capitol representatives with defendants and their representatives, and those representatives informed Capitol that defendants would adhere to their position, until such time as Capitol provided the information defendants had sought from EMI. Petitioner EMI Limited and Capitol both then filed cases in the United States District Court for the Northern District of California against the defendants, to restrain such an assessment against Capitol, and in EMI's case to restrain defendants from demanding of EMI, either directly or through Capitol, information it was prohibited by British law from revealing, from lessening the value of EMI's property in the United States through the assertion of unconstitutional taxes from Capitol, and from burdening EMI's foreign commerce with the United States.

Cross-motions for summary judgment were filed, in petitioner's motion supported by extensive affidavits of officers

of EMI and Capitol, and documentary exhibits. While these cases were pending in the United States District Court, defendants' representatives proposed to Capitol's representatives that defendants would change the basis of assessment, to combine Capitol only with EMI's music business. Capitol's representatives informed defendants' representatives that the information they needed for such a modified combination and apportionment was not available under British law, so the representatives of defendants devised figures based upon assumptions and estimates and employed those in the apportionment formula in substitution for the figures that they had previously used which had represented the entire worldwide business of petitioner. The effect was to reduce the deficiency, but a substantial deficiency in excess of $800,000 still remains in issue for the years determined by defendants, and an unknown but certain amount for later years.

The District Court rendered summary judgment for defendants, holding that for purpose of Section 1341, petitioner, although not having any judicial remedy in the California courts, must be deemed to have the remedy California law afforded to Capitol. Appeal was taken, and the Court of Appeals held that petitioner had no remedy in the California courts and Section 1341 did not bar it from the federal courts. It remanded the case to the District Court, which refused to rule on the merits and dismissed the case, this time on the grounds that petitioner lacked standing to sue, and that the federal courts lacked jurisdiction of the subject matter. This appeal followed.

This petition before judgment below is filed to enable this Court, if it so desires, to add a case involving a foreign parent in a multi-national group of corporations with

American subsidiaries to those cases which it will consider, *Container Corp. of America v. Franchise Tax Board*, No. 81-523, and *Chicago Bridge and Iron Co. v. Caterpillar*, No. 81-349. Those cases involve the Constitutional validity of combining domestic parents with their foreign subsidiaries and the apportionment of the income of the latter to the domestic parents. The instant case presents the converse, where the parent is a foreign corporation and the effect of the combination is to attribute its foreign source income downstream to the domestic subsidiary. As the amicus brief of the Solicitor General in No. 81-349 states, at p. 18, this type of case presents the violation of international custom and the burden on foreign commerce in the clearest focus.

Petitioner does operate in foreign commerce between the United Kingdom and the United States. Its subsidiaries sell completed phonograph records to a United States outlet, but not to Capitol. It and its subsidiaries have a matrix exchange agreement with Capitol, modeled closely after the one which EMI Limited had with RCA before EMI acquired controlling interest in Capitol, under which each party has an option to license a duplicate matrix of recordings made by the other, to make recordings of the music embedded on that matrix and to sell them in their marketing areas. This agreement is entirely reciprocal, giving EMI precisely the same rights in respect of matrices of music recorded by Capitol as it gives Capitol for matrices made by EMI. The agreement confers an option right on each party, and does not bind either party to take any of the matrix offerings of the other. The license fees and other amounts paid for the privilege are entirely reciprocal, so that the amounts paid by Capitol to EMI are the same as the amounts paid by EMI to Capitol, per unit manufactured.

Petitioner contends that taxing Capitol on an apportioned amount of EMI's income represents a forbidden burden on foreign commerce, contrary to the Constitution of the United States, and contrary to international law, and to the United States-United Kingdom Income Tax Convention.

Petitioner contends that it is not engaged in a single unitary business with Capitol, and that the income of each can be readily ascertained by the arm's length method used by the United States Government under Section 482 of the Internal Revenue Code, and by all foreign governments.

REASONS FOR GRANTING THE WRIT

1. This Court has accepted jurisdiction of two cases[1] presenting the constitutional issues raised by the application of their combined apportionment formulae by states to foreign source income of foreign subsidiaries of domestic parent corporations. The urgency of this case is that it presents another, and vitally important, aspect of the same problem: viz, the application of such combined apportionment formulae to the foreign source income of foreign parent corporations with an American subsidiary. This aspect of the problem should be considered while the Court is considering the other cases. Considerations unique to the foreign parent, such as treaties, double taxation of the before-tax income, and the fact the foreign source income of foreign parents will never be paid into the United States, and will never be within the reach of the United

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[1] *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., Illinois Department of Revenue*, No. 81-349; and *Container Corporation of America v. Franchise Tax Board*, no. 81-523.

States, are considerations the Court should have presented to it on plenary argument, and will not have before it in cases involving American parent corporations. The amicus brief filed by the Solicitor General in No. 81-349 presents some of these arguments and acknowledges (p. 18) that they are involved with full force in a case such as this one, in which a state is attempting to force the foreign source income of a foreign parent downstream to its American subsidiary, and tax the latter on it.

2. The Court has been made aware by the Solicitor General's brief and the other amicus briefs in Nos. 81-349 and 81-523 that there is no more serious international controversy involving the United States in the area of taxation than that which has been engendered by the insistence of certain states on applying their combined unitary apportionment formulae to foreign-based multinational corporations and their foreign subsidiaries, and then combining them with their American subsidiaries. The Court has been informed repeatedly that three Presidents of the European Economic Community have filed protests with the Department of State against this practice. The Governments of the United Kingdom, Canada and the Netherlands have filed letters of protest with the Department of State. Members of Parliament of the United Kingdom have gone so far as to testify before a Congressional Committee in Washington in support of bills which would prohibit states' including foreign source income of multinational corporate groups owned by foreign corporations within their unitary apportionment formulae. All of these letters were written to the Department of State after the United State Senate refused, by two votes less than the two-thirds

required for approval, to approve the explicit prohibition of such practice in the new United States-United Kingdom Income Tax Convention.

3. The International community has shown much more concern with the avoidance of duplication of income taxes than it has with the duplication of property taxes. There are presently 40 such treaties either in effect between the United States and foreign nations or signed and in the process of ratification. There are many more than that in effect bilaterally between other nations. International organizations have model tax treaties all containing procedures for avoiding duplication of income taxes. The concern this Court expressed in *Japan Line, Ltd. v. County of Los Angeles,* 41 U.S. 434 (1979), about duplication of taxation in foreign commerce and the retaliatory effect that could be expected from permitting a state to impose taxes on foreign commerce which duplicate the tax burden imposed by the home nation, should be even greater here. The duplication of income taxation in the international sphere is an issue of much bigger international importance than was the duplication of property taxes this Court disapproved in *Japan Line.* As we will show hereafter, the retaliation which this Court foresaw would follow from the duplication of tax involved in *Japan Line,* if this Court had permitted it to occur, has already occurred in the international income tax sphere. The EMI Limited case and its companion case, Capitol Industries-EMI, Inc. v. Bennett, et al., No. 82-688, October Term 1982, are excellent vehicles for the consideration of the impact of this type of combined formula because the feared duplication of tax exists in fact, and the ultimate equity owner of the income which has been taxed twice is a foreign corporation, formed

under the laws and operating in a treaty nation, and having no permanent establishment in the United States. The impact of any decision in this area involving domestically-owned multinational corporate groups cannot be fully assessed by this Court without consideration of the possible impact of such a decision on foreign parents of multinational groups which have one or more subsidiaries operating in the United States.

The State of California has argued in its brief filed in No. 81-523, at pp. 116-118, that the international prohibition of duplication of taxes cannot apply to state taxes because it is accepted custom within the United States for both the federal government and the states' governments to tax the same income. That argument misses the entire point of the international custom. By bilateral treaties where they are in effect and international custom where they are not, the foreign countries have pledged themselves to abstain or do in fact abstain from demanding tax contributions to run their own governments from income which has paid a tax in another country. The United States cannot escape the same obligation by resort to the division of governmental expenditures between federal and state governments. The United States is responsible internationally for the conduct of its states, and is the government which is regarded internationally as the responsible government for providing governmental services in the United States. If it chooses to delegate some of them to political subdivisions it may, but it cannot thereby avoid restrictions against the double taxation of income by expecting foreign governments to tolerate doubly taxing income to support the political subdivisions of the United States of America.

4. International law prohibits what defendants seek to do, this Court should so declare, and in this case can do so. Unlike the situation in the *Japan Line* case, here there is an entire absence of nexus. Petitioner has no property of its own or office in California. Under International law ownership of the stock of Capitol does not establish the presence of petitioner in every State in which Capitol operates. International law is based on custom and settled practice as much as on multilateral treaties and agreements. *Sears v. The Scotia,* 14 Wall (81 U.S.) 170 (1872); *The Paquete Habana,* 175 U.S. 677, 686, 708 (1900); Statute of the International Court of Justice, Sec. 38(1); Statute of the World Court, Sec. 36; Restatement of the Foreign Relations Law of the United States, Second, Sec. 1, Comment C. Every state is subordinate to International law. *Banco National de Cuba v. Sabbatino,* 376 U.S. 398, 425 (1964). The international custom to respect the distinction between foreign parent and domestically formed subsidiary is so thoroughly accepted that it is in each of the forty income tax treaties the United States has signed and in addition is universally respected between nations where there is no treaty. Thus, for example, Mexico and the United States, and Colombia, Venezuela, Peru, Chile and Spain, and the United States, all recognize the custom in the absence of treaty. Thus under International Law California's jurisdiction over Capitol does not confer jurisdiction over petitioner.

The official position of the Executive about what is prevailing international custom binds the American courts (Draft Restatement of Foreign Relations Law (Revised) American Law Institute, Sec. 132(3)). The Solicitor General's amicus brief in No. 81-39 is an expression of the

Executive's position. Before that, in 1977, both Secretary of the Treasury Blumenthal and Assistant Secretary Woodworth testified before the Senate Foreign Relations Committee that the California combined unitary apportionment method was contrary to "the internationally accepted approach" and "is inconsistent with accepted tax treaty policy." (Hearings Before the Senate Foreign Relations Committee, July 19, and 20, 1977, 95th Cong. 1st. Sess. pp. 20-21, 412, 489-490.)

Notes from the Governments of the United Kingdom, Canada and The Netherlands, and from three Presidents of the European Economic Community to the United States Department of State, have spoken of the competing allocation method required by all treaties in force, known as the arms-length basis, as the internationally accepted basis, and have protested California's departure from it.

The importance of this Court's early review of California's departure from International law, in conjunction with the two cases it is reviewing, and presenting the situation the Solicitor General has stated presents the international issue in its clearest form, justifies the Court's review of this case at this time.

5. The action defendants would take is in violation of the treaty then in effect. While it seems not to be a model of clarity to eyes accustomed to distinguishing between state and federal governments, it must be read as an international document speaking for two nations indivisible. The treaty contains clear indications that the treaty binding "the United States" was intended to bind all 50 of them. The treaty language was intended to be understood on both sides of the Atlantic, and in diplomatic usage "State" means "nation". The treaty refers repeatedly to

corporations "created or organized in or under the laws of the United States". All American private business corporations are organized under the laws of some State, so the term "United States" is clearly used to include the states, and if that meaning is applied throughout defendants are in violation of the treaty. Petitioner does not have a permanent establishment in the United States and is exempted by the treaty from taxes imposed by "the United States of America."

6. In *Japan Line, Ltd. v. County of Los Angeles, supra*, this Court predicted that foreign governments would be driven to retaliate against the United States if American states were permitted to impose a duplicating tax on property already, and properly, taxed in the home country. California's tax practices typified by what defendants are seeking to do here have already produced retaliation by the United Kingdom. The new U.S.-U.K. Income Tax Convention as signed, and approved by the British Parliament, contained an express prohibition of states' combined formulae as applied to United Kingdom parents and their American subsidiaries. The United States Senate approved the treaty except for that provision, which narrowly failed to obtain two-thirds approval. This required that the British Parliament ratify the treaty without that provision, which for two years it refused to do. It insisted on another revision, the Third Protocol (see Appendix E), which had the effect of permitting increases in the taxation of American corporations operating in the British North Sea. This retaliatory effect is not confined to California's corporations.

There is no assurance other countries will not also retaliate against the California combined formula. There are

nine members of the EEC who joined in the denunciation of the California practice. Since one has already retaliated, it is reasonable to expect others to do so. Certainly the danger this Court foresaw if the States are free to impose multiple tax burdens on foreign commerce is present here, and this Court should review the permissibility of the California method of measuring its tax on domestic subsidiaries by the foreign source income of their foreign parents as soon as possible.

This case provides a suitable vehicle.

7. The decision of the District Court concerning jurisdiction does not present an issue which would cause this Court to review that decision before consideration in the Court of Appeals, but this Court cannot well grant certiorari on the merits of our petition unless it believes that it has jurisdiction to do so. Hence we argue the jurisdictional point.

The District Court apparently understood the opinion of the Court of Appeals as instructing it to dismiss, although the Court of Appeals had not considered the point on the merits, said so, and even refused to permit petitioner to file a post-argument brief on the point, which had not been discussed in the previous briefs. The standing to sue objection is wholly without merit.

First, the District Court relied on a number of prior decisions by the Court of Appeals for the Ninth Circuit which that court had referred to in remanding the case for consideration of the issue, to the effect that ordinarily a parent corporation does not have standing to sue to object to what is being done to its subsidiary. There is neither logic nor justice in permitting that analysis to prevail in a case such

as this one, where the complainant is suing to prevent the defendants from disregarding the complainant's corporate entity. The state tax officials are disregarding petitioner's corporate entity in allocating some of its net income to Capitol for taxation to that corporation. The income of petitioner is not the income of Capitol, unless the corporate entity of petitioner is disregarded, or unless Capitol's corporate entity be disregarded and its operations deemed to be those of petitioner. The latter contention has never been made, but if it were it would make EMI the principal and end the standing to sue debate. Where the merits of the case present the propriety of the disregard of petitioner's corporate entity, it cannot be said that petitioner is without standing to sue to prevent it. A cynical disregard of justice would be carried to the extreme if the doctrine of corporate entity prevents a parent corporation from suing to prevent defendants from disregarding the parent's corporate entity.

Secondly, petitioner has standing to sue based upon its own claim for relief. The first claim for relief is that petitioner's property in the United States would be diminished in value if defendants are permitted unimpeded to do what they are attempting to do. Petitioner thus suffers directly an economic detriment which it seeks to prevent. The fact that petitioner's property is stock in a corporation instead of tangible personal property, or a bank account, or land, should not alter the fact that the stock it owns in Capitol is petitioner's property, and defendants are seeking to diminish its value by asserting an unconstitutional tax against it. The complainant's capacity to assert a case or controversy does not depend on the type of property which defendants would burden. Threatened injury to any property gives its owner the "personal stake in the outcome," thus providing "that concrete adverseness which sharp-

ens the presentation of issues . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962). The added requirement of causal connection between the threatening conduct and the injury (*Duke Power Co. v. Carolina Env. Study Grp.*, 438 U.S. 59, 72) is abundantly present, and is significantly clearer than it was in *Duke Power*. Petitioner's standing is based on a present ownership of threatened property, not one contingent on future events, yet even such a contingent economic stake can confer standing to sue. *Bryant v. Yellen*, 447 U.S. 352 (1980).

Furthermore, petitioner seeks relief to prevent defendants from continuing to make demands on it and its subsidiary that it violate British law in order to supply them with information beyond their jurisdiction to obtain directly. The Court of Appeals stated in a footnote in its remanding opinion that only one demand was made against petitioner and the rest of the demands were made against Capitol. We do not see why that should effect the result adversely to petitioner, since clearly defendants were seeking to use economic pressure on petitioner's property to force petitioner to supply information to them it could not supply under penalty of violation of British law.

Freedom from demands for information was held to confer standing to sue in *United States Steel Corp. v. Multi-State Tax Commission*, 367 F.Supp. 107 (S.D.N.Y. 1973, affirmed on other grounds 434 U.S. 452). This is the landmark case which upheld the constitutional validity of the Multi-State Tax Commission. If this court had disagreed with the views of the District Court that United States Steel had standing to sue to object to the demands on it for information it is unlikely this Court would have used such a case for the establishment of such a landmark principle.

In any event, the standing to sue to make that objection seems self-evident.

Finally, only petitioner has the certain and clear right to sue to enforce the United States-United Kingdom Income Tax Convention. The damage to it through violation of that treaty is a reduction in the value of its property in the United States attributable to the defendants refusing to comply with the treaty. Their conduct in taxing Capitol on EMI's income is a violation of the treaty, in petitioner's eyes, and is part of petitioner's case in the Federal courts.

Finally, the spectacle we would be presented with if the District Court should be affirmed would be that a foreign corporation, aggrieved by conduct of American officials, has no judicial remedy available to it in the United States. The State courts provide no relief because they provide no remedy for this petitioner, as the Court of Appeals held on the first appeal, and the District Court has held that the Federal Courts provide no remedy either. Yet international law obligates the United States to provide a forum for the protection and enforcement of treaty rights and other rights which international law recognizes. See Restatement of the Foreign Relations Law of the United States (Draft Revision), Sec. 711, comment a; Sec. 713, comment a. This rule was pointed out to the District Court in the brief filed there but was ignored.

Moreover, aliens are entitled to procedural due process under the Fifth Amendment (*Wong Wing et al. v. United States*, 163 U.S. 228 (1896), and a federal statute should not be interpreted to challenge that rule (*Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931)). By parallel reasoning, a judicial interpretation of the case or contro-

versy requirement should not lead to a denial of any American forum, since that result would deny procedural due process.

The further ruling of the District Court that it lacked subject matter jurisdiction of an action arising under a United States treaty, the United States Constitution and international law is incomprehensible, is erroneous, and should be disapproved.

CONCLUSION

This case represents the vehicle for this Court's consideration of the constitutional status, under the United States Constitution and International Law, of the combined unitary formula used by California and certain other states, where the parent corporation and most of the included corporations are foreign corporations, and a domestic subsidiary is combined with them, providing the state with the opportunity to assert the right to apportion some of their income to itself to tax. None of the foreign corporations has a permanent establishment in the United States, and a mathematically determined percentage of the total income of the group is assigned to the domestic subsidiary for taxation, without regard to the absence of any overreaching or other conduct which could have the effect of improperly shifting income from the subsidiary to the foreign sources, and to the fact any irregularities could be adequately dealt with by the internationally accepted arm's-length method. This case would expand the scope of this Court's consideration of the *Container Corporation of America v. Franchise Tax Board*, No. 81-523, to include a domestic subsidiary of a foreign parent, and thus provide the Court with a vehicle suitable for considering fully the

objections of the foreign nations to California's departure from established international custom, and California's double taxation of income already fully taxed in the host or parent country.

We believe the procedural objections the District Court found should not deter the Court, because standing to sue is plainly present on the facts and under this Court's prior decisions, and subject matter jurisdiction is clearly present.

Accordingly, the Writ of Certiorari should be granted.

Respectfully submitted,

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(Appendices follow)